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Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions

Addendum

Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto

I. Introduction

1. The present document contains interpretative notes that were discussed by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime throughout the process of negotiation of the draft Convention. These notes will be included in the official records of the negotiation process, which the Secretariat will prepare in accordance with standard practice. The Ad Hoc Committee was informed by the Secretariat in document A/AC.254/33 of the nature of the official records of the negotiation and of the practice regarding their drafting and compilation. The present document is submitted to the General Assembly for information purposes only. The Ad Hoc Committee took no formal action on these notes and none is expected of the Assembly at its fifty-fifth session.

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II. Interpretative notes

A. Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime

Article 2: Use of terms

Subparagraph (a)

2. The *travaux préparatoires* should indicate that the inclusion of a specific number of persons would not prejudice the rights of States Parties pursuant to article 34, paragraph 3.

3. The *travaux préparatoires* should indicate that the words "in order to obtain, directly or indirectly, a financial or other material benefit" should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.

Subparagraph (c)

4. The *travaux préparatoires* should indicate that the term "structured group" is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined.

Subparagraph (f)

5. The *travaux préparatoires* should indicate that the terms "freezing" or "seizure" as defined in article 2, subparagraph (f), can be found in articles 12 and 13 of the United Nations Convention against Transnational Organized Crime. The term "search and seizure" appearing in article 18 should not be confused with "seizure" in article 2. "Search and seizure" refers to the use of intrusive compulsory measures by law enforcement authorities to obtain evidence for purposes of a criminal case. The term "freezing" in article 18 is used to cover the concept defined as "freezing" or "seizure" in article 2 and should be understood more broadly to include not only property but also evidence.

Subparagraph (g)

6. The *travaux préparatoires* should indicate that when the domestic law of a State Party requires the order of a court for confiscation, that court will be considered the only competent authority for the purposes of this definition.

Article 3: Scope of application

7. During the negotiation of the Convention, the Ad Hoc Committee noted with deep concern the growing links between transnational organized crime and terrorist crimes, taking into account the Charter of the United Nations and the relevant resolutions of the General Assembly. All States participating in the negotiations expressed their determination to deny safe havens to those who engaged in

transnational organized crime by prosecuting their crimes wherever they occurred and by cooperating at the international level. The Ad Hoc Committee was also strongly convinced that the Convention would constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage, and the growing links between transnational organized crime and terrorist crimes. Finally, the Ad Hoc Committee was of the view that the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996, which was then beginning its deliberations with a view to the development of a comprehensive convention on international terrorism, pursuant to Assembly resolution 54/110 of 9 December 1999, should take into consideration the provisions of the Convention.

Paragraph 2 (d)

8. The *travaux préparatoires* should indicate that the term "substantial effects" is intended to cover situations where an offence has had a substantial consequential adverse effect on another State Party, for example where the currency of one State Party is counterfeited in another State Party and the organized criminal group has put the counterfeit currency into global circulation.

Article 5: Criminalization of participation in an organized criminal group

9. The *travaux préparatoires* should indicate that the "other measures" mentioned in articles 5, 6, 8 and 23 are additional to legislative measures and presuppose the existence of a law.

Article 6: Criminalization of the laundering of the proceeds of crime

10. The *travaux préparatoires* should indicate that the terms "laundering of proceeds of crime" and "money-laundering" are understood to be equivalent.

Paragraphs 1 (a) and (b)

11. The *travaux préparatoires* should show that the terms "concealing or disguising" and "concealment or disguise" should be understood to include preventing the discovery of the illicit origins of property.

Paragraph 2 (b)

12. The *travaux préparatoires* should include a note to the effect that the words "associated with organized criminal groups" are intended to indicate criminal activity of the type in which organized criminal groups engage.

Paragraph 2 (e)

13. In the *travaux préparatoires* it should be stated that subparagraph (e) takes into account legal principles of several States where prosecution or punishment of the same person for both the predicate offence and the money-laundering offence is not permitted. Those States confirmed that they did not refuse extradition, mutual legal assistance or cooperation for purposes of confiscation solely because the request

was based on a money-laundering offence the predicate offence of which was committed by the same person.

Article 7: Measures to combat money-laundering

Paragraph 1 (a)

14. The *travaux préparatoires* should indicate that the words "other bodies" may be understood to include intermediaries, which in some jurisdictions may include stockbroking firms, other securities dealers, currency exchange bureaux or currency brokers.

15. The *travaux préparatoires* should indicate that the words "suspicious transactions" may be understood to include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer's business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general.

Paragraph 1 (b)

16. The *travaux préparatoires* should indicate that the establishment of a financial intelligence unit called for by this subparagraph is intended for cases where such a mechanism does not yet exist.

Paragraph 3

17. The *travaux préparatoires* should indicate that, during the negotiations, the words "relevant initiatives of regional, interregional and multilateral organizations" were understood to refer in particular to the forty recommendations of the Financial Action Task Force on Money Laundering, as revised in 1996, and, in addition, to other existing initiatives of regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union and the Organization of American States.

Article 8: Criminalization of corruption

Paragraph 1

18. The *travaux préparatoires* should indicate that the obligation under this article was not intended to include the actions of a person who acted under such a degree of duress or undue influence as to constitute a complete defence to the crime.

Paragraph 4

19. The *travaux préparatoires* should indicate that the concept of a person who provides a public service applies to particular legal systems and that the incorporation of the concept into the definition is intended to facilitate cooperation between States Parties with that concept in their legal systems.

Article 11: Prosecution, adjudication and sanctions

Paragraph 4

20. The *travaux préparatoires* should indicate that paragraph 4 would not oblige States Parties to provide for early release or parole of imprisoned persons if their legal systems did not provide for early release or parole.

Article 12: Confiscation and seizure

21. The *travaux préparatoires* should indicate that interpretation of article 12 should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State. Furthermore, the *travaux préparatoires* should indicate that it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations.

Paragraph 1 (b)

22. The *travaux préparatoires* should indicate that the words "used in or destined for use in" are meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime.

Paragraph 5

23. The *travaux préparatoires* should indicate that the words "other benefits" are intended to encompass material benefits, as well as legal rights and interests of an enforceable nature, that are subject to confiscation.

Article 13: International cooperation for purposes of confiscation

24. The *travaux préparatoires* should indicate that references in this article to article 12, paragraph 1, should be understood to include reference to article 12, paragraphs 3-5.

Article 14: Disposal of confiscated proceeds of crime or property

25. The *travaux préparatoires* should indicate that, when feasible, States Parties would examine whether it would be appropriate, in conformity with individual guarantees embodied in their domestic law, to use confiscated assets to cover the costs of assistance provided pursuant to article 24, paragraph 2.

Article 15: Jurisdiction

Paragraph 2 (a)

26. The *travaux préparatoires* should reflect the understanding that States Parties should take into consideration the need to extend possible protection that might stem from the establishment of jurisdiction to stateless persons who might be habitual or permanent residents in their countries.

Paragraph 5

27. The *travaux préparatoires* should indicate that an example of how useful coordination between States Parties would be was the need to ensure that time-sensitive evidence was not lost.

Article 16: Extradition

Paragraph 2

28. The *travaux préparatoires* should indicate that the purpose of paragraph 2 is to serve as an instrument for States Parties wishing to avail themselves of the facility it provides. It is not intended to broaden the scope of the article unduly.

Paragraph 8

29. The *travaux préparatoires* should indicate that this paragraph should not be interpreted as prejudicing in any way the fundamental legal rights of the defendant.

30. The *travaux préparatoires* should indicate that one example of implementation of this paragraph would be speedy and simplified procedures of extradition, subject to the domestic law of the requested State Party for the surrender of persons sought for the purpose of extradition, subject to the agreement of the requested State Party and the consent of the person in question. The consent, which should be expressed voluntarily and in full awareness of the consequences, should be understood as being in relation to the simplified procedures and not to the extradition itself.

Paragraph 10

31. The *travaux préparatoires* should reflect the general understanding that States Parties should also take into consideration the need to eliminate safe havens for offenders who commit heinous crimes in circumstances not covered by paragraph 10. Several States indicated that such cases should be reduced and several States stated that the principle of *aut dedere aut judicare* should be followed.

Paragraph 12

32. The *travaux préparatoires* should indicate that the action referred to in paragraph 12 would be taken without prejudice to the principle of double jeopardy (*ne bis in idem*).

Paragraph 14

33. The *travaux préparatoires* should indicate that the term "sex" refers to male and female.

34. The *travaux préparatoires* should indicate that, at the informal consultations held during the eighth session of the Ad Hoc Committee, the delegation of Italy proposed the insertion after paragraph 8 of the following provision:

> "Without prejudice to the use of other grounds for refusal, the requested State may refuse to extradite on the ground that a decision has been issued in absentia only if it is not proved that the case has been tried with the same guarantees as when a defendant is present and he or she, having knowledge of the trial, has deliberately avoided being arrested or has deliberately failed to

appear at the trial. However, when such proof is not given, extradition may not be refused if the requesting State gives assurance, deemed satisfactory by the requested State, that the person whose extradition is sought shall be entitled to a new trial protecting his or her rights of defence."

In the discussion that followed, several delegations expressed serious concerns about whether this provision would be compatible with the fundamental principles of their respective legal systems. The delegation of Italy withdrew its proposal at the ninth session of the Ad Hoc Committee on the understanding that, when considering a request for extradition pursuant to a sentence issued in absentia, the requested State Party would take into due consideration whether or not the person whose extradition was sought had been sentenced following a fair trial, for example, whether or not the defendant had been assured the same guarantees as he or she would have enjoyed had he or she been present at the trial and had voluntarily escaped from justice or failed to appear at the trial, or whether or not he or she was entitled to a new trial.

Paragraph 16

35. The *travaux préparatoires* should indicate that the words "where appropriate" in article 16, paragraph 16, are to be understood and interpreted in the spirit of full cooperation and should not affect, to the extent possible, the obligatory nature of the paragraph. The requested State Party shall, when applying this paragraph, give full consideration to the need to bring offenders to justice through extradition cooperation.

Article 18: Mutual legal assistance

Paragraph 2

36. The *travaux préparatoires* should indicate that the term "judicial proceedings" in article 18, paragraph 2, refers to the matter for which mutual legal assistance is requested and is not intended to be perceived as in any way prejudicing the independence of the judiciary.

Paragraph 5

37. The *travaux préparatoires* should indicate that (a) when a State Party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State Party concerned to consult with the potential receiving State beforehand; (b) when a State Party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State.

Paragraph 8

38. The *travaux préparatoires* should indicate that this paragraph is not inconsistent with paragraphs 17 and 21 of this article.

Paragraph 10 (b)

39. The *travaux préparatoires* should indicate that, among the conditions to be determined by States Parties for the transfer of a person, States Parties may agree that the requested State Party may be present at witness testimony conducted in the territory of the requesting State Party.

Paragraph 13

40. The *travaux préparatoires* should indicate that a central authority may be different at different stages of the proceedings for which mutual legal assistance is requested. Further, the *travaux préparatoires* should indicate that this paragraph is not intended to create an impediment to countries having a central authority as regards receiving requests or to a different central authority as regards making requests.

Paragraph 18

41. The *travaux préparatoires* should indicate that the delegation of Italy made a proposal on the matter covered by this paragraph (see document A/AC.254/5/Add.23). During the debate on the proposal, it was pointed out that the following part of it, not reflected in the text of the Convention, could be used by States Parties as guidelines for the implementation of article 18, paragraph 18:

> "(a) The judicial authority of the requested State Party shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing, draw up minutes indicating the date and place of the hearing and any oath taken. The hearing shall be conducted without any physical or mental pressure on the person questioned;
>
> "(b) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he or she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;
>
> "(c) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;
>
> "(d) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury;
>
> "(e) All the costs of the video conference shall be borne by the requesting State Party, which may also provide as necessary for technical equipment."

Paragraph 21 (d)

42. The *travaux préparatoires* should indicate that the provision of paragraph 21 (d) of this article is not intended to encourage refusal of mutual assistance for any reason, but is understood as raising the threshold to more essential principles of domestic law of the requested State. The *travaux préparatoires* should also indicate that the proposed clauses on grounds for refusal relating to the prosecution or punishment of a person on account of that person's sex, race, religion, nationality or political opinions, as well as the political offence exception,

were deleted because it was understood that they were sufficiently covered by the words "essential interests" in paragraph 21 (b).

Paragraph 28

43. The *travaux préparatoires* should indicate that many of the costs arising in connection with compliance with requests under article 18, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Further, the *travaux préparatoires* should indicate the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.

Article 20: Special investigative techniques

Paragraph 1

44. The *travaux préparatoires* should indicate that this paragraph does not imply an obligation on States Parties to make provisions for the use of all the forms of special investigative technique noted.

Article 22: Establishment of criminal record

45. The *travaux préparatoires* should indicate that the term "conviction" should be understood to refer to a conviction no longer subject to any appeal.

Article 23: Criminalization of obstruction of justice

Subparagraph (a)

46. The *travaux préparatoires* should indicate that the term "proceeding" is intended to cover all official governmental proceedings, which may include the pre-trial stage of a case.

47. The *travaux préparatoires* should indicate that it was understood that some countries may not cover cases where a person has the right not to give evidence and an undue advantage is provided for the exercise of that right.

Article 25: Assistance to and protection of victims

48. The *travaux préparatoires* should indicate that, while the purpose of this article is to concentrate on the physical protection of victims, the Ad Hoc Committee was cognizant of the need for protection of the rights of individuals as accorded under applicable international law.

Article 26: Measures to enhance cooperation with law enforcement authorities

Paragraph 2

49. The *travaux préparatoires* should indicate that the term "mitigating punishment" might include not only prescribed but also de facto mitigation of punishment.

Article 27: Law enforcement cooperation

Paragraph 1

50. The *travaux préparatoires* should indicate that the words "consistent with their respective domestic legal and administrative systems" provide States Parties with flexibility regarding the extent and manner of cooperation. For example, this formulation enables States Parties to deny cooperation where it would be contrary to their domestic laws or policies to provide the assistance requested.

Paragraph 1 (a)

51. The *travaux préparatoires* should indicate that States Parties will make their own determination as to how best to ensure the secure and rapid exchange of information. Many delegations endorsed the use of direct communication between their different domestic law enforcement agencies and foreign counterparts. However, States Parties that feel it more advisable to establish a central point of contact to ensure efficiency would not be precluded from doing so.

Paragraph 3

52. The *travaux préparatoires* should indicate that the forms of modern technology referred to in article 27, paragraph 3, include computers and telecommunications networks.

Article 28: Collection, exchange and analysis of information on the nature of organized crime

Paragraph 2

53. The *travaux préparatoires* should indicate that the mention of international and regional organizations is intended to refer to all relevant organizations, including the International Criminal Police Organization (Interpol), the Customs Cooperation Council (also called the World Customs Organization) and the European Police Office (Europol).

Article 29: Training and technical assistance

Paragraph 4

54. The *travaux préparatoires* should indicate that the mention of international and regional organizations is intended to refer to all relevant organizations, including Interpol, the World Customs Organization and Europol.

Article 31: Prevention

Paragraph 3

55. The *travaux préparatoires* should indicate that, in line with constitutional principles of equality, there is no distinction intended between persons convicted of offences covered by the Convention and persons convicted of other offences.

Article 32: Conference of the Parties to the Convention

Paragraph 2

56. The *travaux préparatoires* should indicate that, in developing rules concerning payment of its expenses, the Conference of the Parties to the Convention should ensure that voluntary contributions are considered a source of funding.

Paragraph 3

57. The *travaux préparatoires* should state that, in discharging its tasks, the Conference of the Parties should give due regard to the need to preserve the confidentiality of certain information, given the nature of the fight against transnational organized crime.

Paragraph 5

58. The *travaux préparatoires* should show that the Conference of the Parties should take into account the need to foresee some regularity in the provision of the information required. The *travaux préparatoires* should also indicate that the term "administrative measures" is understood to be broad and to include information about the extent to which legislation, policies and other relevant measures have been implemented.

Article 34: Implementation of the Convention

Paragraph 2

59. The *travaux préparatoires* should state that the purpose of this paragraph is, without altering the scope of application of the Convention as described in article 3, to indicate unequivocally that the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes. The paragraph is intended to indicate to States Parties that, when implementing the Convention, they do not have to include in their criminalization of laundering of criminal proceeds (article 6), corruption (article 8) or obstruction of justice (article 23) the elements of transnationality and involvement of an organized criminal group, nor in the criminalization in an organized criminal group (article 5) the element of transnationality. This provision is furthermore intended to ensure clarity for States Parties in connection with their compliance with the criminalization articles of the Convention and is not intended to have any impact on the interpretation of the cooperation articles of the Convention (articles 16, 18 and 27).

Article 35: Settlement of disputes

Paragraph 1

60. The *travaux préparatoires* should state that the term "negotiation" is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies.

Article 36: Signature, ratification, acceptance, approval and accession

61. The *travaux préparatoires* should indicate that, while the Convention has no specific provision on reservations, it is understood that the Vienna Convention on the Law of Treaties of 1969[1] applies regarding reservations.

B. Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

Chapter I. General provisions

Article 1: Relation with the United Nations Convention against Transnational Organized Crime

Paragraph 2

62. The *travaux préparatoires* should indicate that this paragraph was adopted on the understanding that the words "mutatis mutandis" meant "with such modifications as circumstances require" or "with the necessary modifications". Provisions of the United Nations Convention against Transnational Organized Crime that are applied to the Protocol under this article would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention.

Article 3: Use of terms

Subparagraph (a)

63. The *travaux préparatoires* should indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

64. The *travaux préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.

65. The *travaux préparatoires* should indicate that the removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation.

66. The *travaux préparatoires* should indicate that where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,[2] it will also fall within the scope of the Protocol.

Subparagraph (b)

67. The *travaux préparatoires* should indicate that this subparagraph should not be interpreted as restricting the application of mutual legal assistance in accordance with article 18 of the Convention.

68. The *travaux préparatoires* should indicate that subparagraph (b) should not be interpreted as imposing any restriction on the right of accused persons to a full defence and to the presumption of innocence. They should also indicate that it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. Further, the *travaux préparatoires* will refer to article 11, paragraph 6, of the Convention, which preserves applicable legal defences and other related principles of the domestic law of States Parties.

Article 5: Criminalization

69. The *travaux préparatoires* should indicate that the "other measures" mentioned here are additional to legislative measures and presuppose the existence of a law.

Paragraph 2

70. The *travaux préparatoires* should indicate that references to attempting to commit the offences established under domestic law in accordance with this subparagraph are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law.

Chapter II. Protection of victims of trafficking in persons

Article 6: Assistance to and protection of victims of trafficking in persons

Paragraph 3

71. The *travaux préparatoires* should indicate that the type of assistance set forth in this paragraph is applicable to both the receiving State and the State of origin of the victims of trafficking in persons, but only as regards victims who are in their respective territory. Paragraph 3 is applicable to the receiving State until the victim of trafficking in persons has returned to his or her State of origin and to the State of origin thereafter.

Article 8: Repatriation of victims of trafficking in persons

Paragraph 1

72. The *travaux préparatoires* should indicate that the words "permanent residence" in this paragraph mean long-term residence, but not necessarily indefinite residence. The paragraph should be understood as being without prejudice to any domestic legislation regarding either the granting of the right of residence or the duration of residence.

Paragraph 2

73. The *travaux préparatoires* should indicate that the words "and shall preferably be voluntary" are understood not to place any obligation on the State Party returning the victims.

Paragraph 3

74. The *travaux préparatoires* should indicate the understanding of the Ad Hoc Committee that a return under this article shall not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.

Paragraph 4

75. The *travaux préparatoires* should indicate that the words "travel documents" include any type of document required for entering or leaving a State under its domestic law.

Paragraph 6

76. The *travaux préparatoires* should indicate that the references to agreements or arrangements in this paragraph include both agreements that deal specifically with the subject matter of the Protocol and more general readmission agreements that include provisions dealing with illegal migration.

77. The *travaux préparatoires* should indicate that this paragraph should be understood as being without prejudice to any other obligations under customary international law regarding the return of migrants.

Chapter III. Prevention, cooperation and other measures

Article 10: Information exchange and training

Paragraph 1

78. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law.

Article 11: Border measures

Paragraph 2

79. The *travaux préparatoires* should indicate that victims of trafficking in persons may enter a State legally only to face subsequent exploitation, whereas in cases of smuggling of migrants, illegal means of entry are more generally used. This may make it more difficult for common carriers to apply preventive measures in trafficking cases than in smuggling cases and legislative or other measures taken in accordance with this paragraph should take this into account.

Paragraph 4

80. The *travaux préparatoires* should indicate that measures and sanctions applied in accordance with this paragraph should take into account other international obligations of the State Party concerned. It should also be noted that this article requires States Parties to impose an obligation on common carriers only to ascertain whether or not passengers have the necessary documents in their possession and not to make any judgement or assessment of the validity or authenticity of the documents. It should further be noted that this paragraph does not unduly limit the discretion of States Parties not to hold carriers liable for transporting undocumented refugees.

Article 12: Security and control of documents

81. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

82. The *travaux préparatoires* should indicate that the words "falsified or unlawfully altered, replicated or issued" should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. They should also indicate that the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.

Article 13: Legitimacy and validity of documents

83. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

Chapter IV. Final provisions

Article 14: Saving clause

Paragraph 1

84. The *travaux préparatoires* should indicate that the Protocol does not cover the status of refugees.

85. The *travaux préparatoires* should indicate that this Protocol is without prejudice to the existing rights, obligations or responsibilities of States Parties under other international instruments, such as those referred to in this paragraph. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by this Protocol. Therefore, any State that becomes a party to this Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to any right, obligation or responsibility under that instrument.

Article 16: Signature, ratification, acceptance, approval and accession

86. The *travaux préparatoires* should indicate that, while the Protocol has no specific provisions or reservations, it is understood that the Vienna Convention on the Law of Treaties of 1969[1] applies regarding reservations.

C. Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Chapter I. General provisions

Article 1: Relation with the United Nations Convention against Transnational Organized Crime

Paragraph 2

87. The *travaux préparatoires* should indicate that this paragraph was adopted on the understanding that the words "mutatis mutandis" meant "with such modifications as circumstances require" or "with the necessary modifications". Provisions of the Convention that are applied to the Protocol under this article would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention.

Article 3: Use of terms

Subparagraph (a)

88. The *travaux préparatoires* should indicate that the reference to "a financial or other material benefit" as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.

Subparagraph (c)

89. The *travaux préparatoires* should indicate that the term "travel document" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity document" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

90. The *travaux préparatoires* should indicate that the words "falsely made or altered" should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. They should also indicate that the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.

Article 6: Criminalization

91. The *travaux préparatoires* should indicate that the "other measures" mentioned here are additional to legislative measures and presuppose the existence of a law.

Paragraph 1

92. The *travaux préparatoires* should indicate that the offences set forth in article 6 should be seen as being part of the activities of organized criminal groups. In this article, the Protocol follows the precedent of the Convention (art. 34, para. 2). The *travaux préparatoires* should also indicate that the reference to "a financial or other material benefit" as an element of the offences set forth in paragraph 1 was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.

93. The *travaux préparatoires* should indicate that paragraph 1 (b) was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included.

94. The *travaux préparatoires* should indicate that the words "any other illegal means" in paragraph 1 (c) refer to illegal means as defined under domestic law.

Paragraph 2

95. The *travaux préparatoires* should indicate that references to attempting to commit the offences established under domestic law in accordance with paragraph 2 (a) are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law.

Paragraph 3

96. The *travaux préparatoires* should indicate that the words "inhuman or degrading treatment" in subparagraph (b) were intended, without prejudice to the scope and application of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, to include certain forms of exploitation.

Paragraph 4

97. The *travaux préparatoires* should indicate that in this paragraph the word "measures" should be interpreted broadly to include both criminal and administrative sanctions.

Chapter II. Smuggling of migrants by sea

98. The *travaux préparatoires* should indicate that it is understood that the measures set forth in chapter II of the Protocol cannot be taken in the territorial sea of another State except with the permission or authorization of the coastal State concerned. This principle is well established in the law of the sea and did not need to be restated in the Protocol. The *travaux préparatoires* should also indicate that the international law of the sea includes the United Nations Convention on the Law of the Sea[3] as well as other relevant international instruments. References to the United Nations Convention on the Law of the Sea do not prejudice or affect in any way the position of any State in relation to that Convention.

Article 7: Cooperation

99. The *travaux préparatoires* should indicate that this Protocol is without prejudice to the existing rights, obligations or responsibilities of States Parties under other international instruments, such as those referred to in this article. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by this Protocol. Therefore, any State that becomes a party to this Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to any right, obligation or responsibility under that other instrument.

Article 8: Measures against the smuggling of migrants by sea

100. The *travaux préparatoires* should indicate that the word "engaged" in paragraphs 1, 2 and 7 of this article and in paragraph 1 of article 10 should be understood broadly as including vessels "engaged" both directly and indirectly in the smuggling of migrants. Of particular concern was the inclusion of both vessels actually found to be carrying smuggled migrants and vessels ("mother ships") that transport smuggled migrants on open ocean voyages but are sometimes not apprehended until after the migrants have been transferred to smaller local vessels for landing purposes.

Chapter III. Prevention, cooperation and other measures

Article 10: Information

Paragraph 1

101. The *travaux préparatoires* should indicate that the obligation to exchange relevant information under this paragraph was adopted on the understanding that this would be done in accordance with both the Protocol and any other applicable treaties, agreements or arrangements that might exist between the States involved.

102. The *travaux préparatoires* should indicate that the word "engaged" in this paragraph and in paragraphs 1, 2 and 7 of article 8 should be understood broadly as including vessels "engaged" both directly and indirectly in the smuggling of migrants. Of particular concern was the inclusion of both vessels actually found to be carrying smuggled migrants and vessels ("mother ships") that transport smuggled migrants on open ocean voyages but are sometimes not apprehended until after the migrants have been transferred to smaller local vessels for landing purposes.

Article 11: Border measures

Paragraph 2

103. The *travaux préparatoires* should indicate that measures and sanctions applied in accordance with this paragraph should take into account other international obligations of the State Party concerned. It should also be noted that this paragraph requires States Parties to impose an obligation on commercial carriers only to ascertain whether or not passengers have the necessary documents in their possession and not to make any judgement or assessment of the validity or authenticity of the documents. It should further be noted that this paragraph does not unduly limit the discretion of States Parties not to hold carriers liable for transporting undocumented refugees and that article 19 preserves the general obligations of States Parties under international law in this regard, making specific reference to the 1951 Convention[4] and 1967 Protocol[5] relating to the Status of Refugees. Article 11 was also adopted on the understanding that it would not be applied in such a way as to induce commercial carriers to impede unduly the movement of legitimate passengers.

Article 12: Security and control of documents

104. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

105. The *travaux préparatoires* should indicate that the words "falsified or unlawfully altered, replicated or issued" should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. They should also indicate that the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.

Article 13: Legitimacy and validity of documents

106. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

Article 16: Protection and assistance measures

Paragraph 1

107. The *travaux préparatoires* should indicate that, in accordance with articles 3 and 4, the words "persons who have been the object of conduct set forth in article 6 of this Protocol" refers only to migrants who have been smuggled as set forth in article 6. It is not intended to refer to migrants who do not fall within the ambit of article 6. This is clearly set forth in article 19 ("Saving clause"), which provides that nothing in the Protocol shall affect the rights of individuals under international law, including humanitarian law and international human rights law.

108. The *travaux préparatoires* should indicate that the intention in listing certain rights in this paragraph was to emphasize the need to protect those rights in the case of smuggled migrants, but that the provision should not be interpreted as excluding or derogating from any other rights not listed. The words "consistent with its obligations under international law" were included in the paragraph to clarify this point further.

109. The *travaux préparatoires* should indicate that this paragraph should not be understood as imposing any new or additional obligations on States Parties to this Protocol beyond those contained in existing international instruments and customary international law.

Paragraph 2

110. The *travaux préparatoires* should indicate that the words "by individuals or groups" were intended to refer to individuals or groups under the jurisdiction of the State Party concerned.

Article 18: Return of smuggled migrants

111. The *travaux préparatoires* should indicate that this article is based on the understanding that States Parties would not deprive persons of their nationality contrary to international law, thereby rendering them stateless.

112. The *travaux préparatoires* should indicate that the term "permanent residence" is understood throughout this article as meaning long-term, but not necessarily indefinite residence. This article is understood not to prejudice national legislation regarding the granting of the right to residence or the duration of residence.

113. The *travaux préparatoires* should indicate the understanding of the Ad Hoc Committee that a return under this article shall not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.

Paragraph 2

114. The *travaux préparatoires* should indicate that there is no inconsistency between paragraphs 1 and 2 of this article. Paragraph 1 deals with the case of a person who is a national or has the right of permanent residence at the time of return. Paragraph 2 is supplementary to paragraph 1 and deals with the case of a person who had the right of permanent residence at the time of entry, but no longer has it at the time of return.

Paragraph 4

115. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law.

Paragraph 8

116. The *travaux préparatoires* should indicate that the references to treaties, agreements or arrangements in this paragraph include both agreements that deal specifically with the subject matter of the Protocol and more general readmission agreements that include provisions dealing with illegal migration.

Chapter IV. Final provisions

Article 19: Saving clause

117. The *travaux préparatoires* should indicate that the Protocol does not cover the status of refugees.

118. The *travaux préparatoires* should indicate that this Protocol is without prejudice to the existing rights, obligations or responsibilities of States Parties under other international instruments, such as those referred to in this article. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by this Protocol. Therefore, any State that becomes a party to this Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to any right, obligation or responsibility under that other instrument.

Article 21: Signature, ratification, acceptance, approval and accession

119. The *travaux préparatoires* should indicate that, while the Protocol has no specific provisions on reservations, it is understood that the Vienna Convention on the Law of Treaties of 1969[1] applies regarding reservations.

Notes

[1] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[2] Ibid., vol. 266, No. 3822.

[3] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

[4] United Nations, *Treaty Series*, vol. 189, No. 2545.

[5] Ibid., vol. 606, No. 8791.